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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re)	CASE NO. BK-S-07-16852-BAM
)	
THE LAND HOLDING GROUP, INC.,)	Chapter 11
)	
Debtor.)	
)	
MOSHE GEDALIA, et al.,)	
)	
Plaintiffs,)	
)	Adv. Case No. 08-01010-BAM
)	
vs.)	
)	POST TRIAL / PRE-ORAL ARGUMENT)
)	BRIEF
)	
ITC FINANCIAL SERVICES, INC.,)	
etc., et al.,)	
)	
Defendants.)	
)	
)	
AND RELATED COUNTERCLAIM)	
)	

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE AND TO THE
PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs and Counterdefendants presents the following Post-
Trial Brief in accordance with this Court's Order of October 2,
2009.

1 In accordance with a stipulation and order entered in the
2 above-entitled matter after the close of evidence at trial,
3 Plaintiffs/Counterdefendants hereby submit their Post Trial /
4 Pre-Oral
5
6 Argument Brief as follows:

7
8 DATED: December 9, 2009

9
10 _____/s/ Thomas Michaelides
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PLAINTIFFS' CASE IN CHIEF

Following the close of Plaintiffs' case in chief, the Court granted Land Holding's Rule 52(c) motion as to the First, Second, Fourth, Fifth, Sixth, Seventh and Ninth causes of action, and denied such motion as to Plaintiffs' claims for 1) RICO; 2) Unjust Enrichment; and 3) Fraud.

1. RICO

Plaintiffs' cause of action for RICO was made pursuant to NRS Section 207.350 et seq. therefore it is a state RICO Claim.

NRS Section 207.360, in relevant part, defines:

"Crime related to racketeering" means the commission of, attempt to commit or conspiracy to commit any of the following crimes:

.....

9) Taking Property from another under circumstances not amounting to robbery"

.....

1 16) Grand larceny;

2

24) Receiving, possessing or withholding stolen goods valued at \$250 or more;

3 25) Embezzlement of money or property valued at \$250 or more;

4 NRS 207.380 defines "Enterprise."

5 "Enterprise" includes:

- 6
- 7 1. Any natural person, sole proprietorship, partnership, corporation,
 - 8 business trust or other legal entity; and
 - 9 2. Any union, association or other group of persons associated in fact
 - 10 although not a legal entity.

11 NRS Section 207.390 defines Racketeering activity as engaging in at
 12 least two crimes related to racketeering that have the same or similar
 13 pattern, intents, results, accomplices, victims or methods of commission,
 14 or are otherwise interrelated by distinguishing characteristics and are not
 isolated incidents, if at least one of the incidents occurred after July 1, 1983,
 and the last of the incidents occurred within 5 years after a prior commission
 of a crime related to racketeering.

15 NRS Section 207.400, in relevant part, sets forth unlawful acts and penalties.

16 1. It is unlawful for a person:

- 17 (a) Who has with criminal intent received any proceeds derived,
 18 directly or indirectly, from racketeering activity to use or
 19 invest, whether directly or indirectly, any part of the proceeds,
 20 or the proceeds derived from the investment or use thereof, in
 the acquisition of:
 21 (1) Any title to or any right, interest or equity in real property; or
 22 (2) Any interest in or the establishment or operation of any enterprise.
 (b) Through racketeering activity to acquire or maintain, directly or
 23 indirectly,
 any interest in or control of any enterprise.
 (c) Who is employed by or associated with any enterprise to
 24 conduct or participate, directly or indirectly, in:
 25 (1) The affairs of the enterprise through racketeering activity; or
 26 (2) Racketeering activity through the affairs of the enterprise.
 (d) Intentionally to organize, manage, direct, supervise or finance
 27 a criminal syndicate.
 28

- (f) To furnish advice, assistance or direction in the conduct,
 29 financing or management of the affairs of the criminal
 30 syndicate with the intent to promote or further the
 criminal objectives of the syndicate.
 31

1 (h) To conspire to violate any of the provisions of this section.

2 NRS Section 207.470 provides:

3
4 1. Any person who is injured in his business or property by reason of
5 any violation of NRS 207.400 has a cause of action against a
6 person causing such injury for three times the actual damages
7 sustained. An injured person may also recover attorney's fees
8 in the trial and appellate courts and costs of investigation and
9 litigation reasonably incurred. Any injured person has a claim
10 to forfeited property or the proceeds derived therefrom and this claim
11 is superior to any claim the State may have to the same property or
12 proceeds if the injured person's claim is asserted before a final decree
13 is issued which grants forfeiture of the property or proceeds to the State.

14 Ron Amiran (Amiran) committed many acts of embezzlement and/or outright theft of
15 money that was money due the Plaintiffs. Amiran set up related companies, using his son as a
16 figurehead, that charged hundreds of thousands of dollars in consulting fees, that were not
17 earned nor authorized, to the Santa Rita Acres Project (Santa Rita). The 3 related companies
18 were 1) Mesconic America, Inc.; 2) ITC Financial Services; and 3) Regency Consulting
19 (Regency). (**Linscott Depo. Pg. 12 Ins 25**). Land Holding Group failed to provide proof that
20 any of the related companies, including Regency and Amiran himself, had a consulting
21 agreement with ITC Homes. (**Linscott Depo. Pg. 13, ln 16 – Pg. 14, ln 1**) Further, Mr.
22 Linscott was unable to obtain any documentation to support that any of the work (consulting)
23 was ever performed. (**Linscott Depo Pg. 24 ln 5 through 16**)(**Linscott Report, Exhibit "44"**)
24 Mr. Linscott went on to testify that roughly \$900,000 was taken out as compensation
25 (consulting fees) by Amiran and that money was the source for Regency and/or Spanish Trails
26 in the transactions they had. So Amiran's use of Regency to purchase lots or to purchase
27 Spanish Trails' involvement derived out of this same \$900,000. That's where he (Amiran) got
28 the money to do it. **Linscott Depo, Pg. 27, Ins 8 – 14**)(**Linscott Report Exhibit "44"**).
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1 Mr. Linscott found that ITC Homes had not made any profits therefore, the money
 2 taken by Amiran, individually and through his related companies, was either from loan money
 3 or from not paying subcontractors. **(Linscott Depo, Pg. 28 ln 6 through Pg. 29 ln**
 4 **13)(Linscott Report, Exhibit “44”).**

6 The only evidence produced at trial regarding Amiran’s compensation was the
 7 undisputed testimony of Eashak “Isaac” Gedalia (Isaac) who testified as follows:
 8

9 Q. Okay. Were you aware of the compensation agreement to MR. Amiran?

10 A. Yes

11 Q. Okay. What was Mr. Amiran’s compensation to be for working for ITC?

12 A. \$5,000 per month

13 Q. I’m sorry. Could you just –

14 A. \$5,000 per month and 20 percent of the profits.

(RT:Sept. 30, 2009 – am session, Pg. 112 ln 21 through
Pg. 113 ln 3)

15 Therefore, as there were no profits, the majority of the \$900,000 found by Mr. Linscott
 16 that was paid to, or for the benefit of Amiran, could only have been embezzled from funds due
 17 the Gedalias.
 18

19 At trial, the evidence showed that Amiran used money identified as consulting fees paid
 20 to Mesconi America to originally purchase the vacant land known as the Mansions at Spanish
 21 Trails in mid-2005. Although the evidence was not quite clear regarding transfers of money
 22 between the Amiran related companies, the ownership of Land Holding Group, Inc. (Land
 23 Holding), which was at least one of the “enterprises” in this matter, at closing of escrow in
 24 October 2005, included Regency 25% interest, David Melamed 25%, who was involved in the
 25 purchase since mid-2005, Shawn Manshoory 37½% and Yaccov Bachar 12½% who were
 26 brought in later. **RT:October 2, 2009 a.m. session Pg. 16 ln 12 through Pg. 17 ln 5)**
 27
 28
 29

30 In order to pull off his scheme to purchase Spanish Trails with money stolen from the
 31 Gedalias, Amiran needed financial assistance. Therefore he turned to his old friend, Mr.

1 Melamed, for help. Mr. Linscott found an unexplained “strange loan transaction” of \$100,000
 2 from Melamed to ITC Homes. **(Linscott Report: Subsection d, Pg. 20; Linscott Depo: Pg.**
 3 **29, lns 12-24)**

5 Mr. Melamed first met Amiran in or about 1974 and had several business relationships
 6 throughout the world. **(RT: October 2, 2009, am session Pg. 9, lns 8-9 – Pg. 9 ln 12 Pg. 13,**
 7 **ln. 12)** Mr. Melamed invested \$200,000 for his 25% of the shares of Land Holding and an
 8 additional \$25,000 for on-site improvements and architectural plans. **(RT: October 2, 2009,**
 9 **a.m. session Pg. 16, lns 8-11 – Pg. 19 lns 19-25)**

11 Sometime after the lawsuit was filed, Mr. Melamed paid Regency \$225,000 for the
 12 shares that Regency held in Land Holding irrespective of his knowledge that the Gedalias were
 13 alleging that Amiran diverted funds due them for, among other things, to purchase Spanish
 14 Trails. Purportedly, Amiran’s son contacted Mr. Melamad and told him Amiran needed
 15 money, that he [Amiran] had a very bad financial situation. **RT: Oct. 2, 2009, am session, Pg.**
 16 **32, ln7-25)** Both Amiran and Melamad were involved in attempting to secure construction
 17 financing for Spanish Trails. **RT: Oct. 2, 2009, am session, Pg. 36, lns 7-22)**

21 Clearly Amiran committed the following unlawful activities relating to racketeering: 1)
 22 violation of NRS Section 207.360(9), taking property from another under circumstances not
 23 amounting to robbery; 2) violation of NRS Section 207.360(16) grand larceny; 3) Violation of
 24 NRS Section 207.360(25), embezzlement of money or property valued at \$250.00 or more; and
 25 4) Violation of NRS Section 207.360(26), obtaining possession of money or property valued at
 26 @250.00 or more, or obtaining a signature by means of false pretenses.
 27

29 Amiran was assisted by Melamad in obtaining the money that paid for Regency’s
 30 purchase of its shares of Land Holding. Although the direct evidence of wrongdoing primarily
 31

1 concerned the unlawful activities of Amiran, actions by Land Holding's principal, Melamad,
2 can make Land Holding liable for aiding and abetting Amiran and the criminal enterprises. In
3 *Wells Fargo Bank v. Arizona Laborers*, 201 Ariz. 474, 38 P.2d (Ariz. 2002) the Court held
4 that if a bank has a "general awareness" of the customer's fraudulent scheme notwithstanding
5 the fact that the bank may not have had actual knowledge of the scheme or an intent to
6 participate in the fraud; general awareness of the fraudulent scheme can be established through
7 circumstantial evidence. The knowledge requirement can be met "even though the bank may
8 not have known of all the details of the primary fraud – the misrepresentations, omissions, and
9 other fraudulent practices."

10 In the instant case, Melamad admitted that he did not perform any due diligence relating
11 to his investment in Land Holding. He did not ask Amiran where the money came from to
12 purchase Spanish Trails. When he invested his money, he did not know who the principals
13 were of Regency. Melamad claims he did not know that Mesonic America was initially
14 involved in the purchase of Spanish Trails; was unaware that ITC had to guarantee the financial
15 performance of Mesonic America; did not do anything to find out who were the principals in
16 Regency; did not perform any due diligence on Regency to determine about its financing,
17 specifically, the financing that it gave for the purchase of Spanish Trail; and did not ask or
18 question Amiran the source of the money which Regency used to purchase its interest in
19 Spanish Trail. **(RT: October 2, 2009, am session, Pg. 60 ln 3 through Pg. 61, ln 2)**

20 It really is inconceivable that a knowledgeable real estate investor and/or developer
21 such as Melamad, would invest a total of \$450,000 in a venture, actively recruit other investors
22 and participate with Amiran for 4 to 5 months to purchase Spanish Trails without performing
23 due diligence. This is particularly true since Melamad knew that Amiran was a convicted felon
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1 for bank fraud, and Amiran still owes approximately \$4,000,000 in restitution. Further, from
2 the time they first met in 1974 until the present, Amiran and Melamad have been in constant
3 contact with each other. Therefore, it can be inferred that, despite Melamad's testimony
4 disclaiming knowledge of Amiran's unlawful activities, Melamad was well aware that Amiran
5 was embezzling from the Gedalias and Melamad was eager to assist him.
6

7
8 Another element of aiding and abetting the fraud of another, *Wells Fargo Bank, supra*,
9 set forth that the aider (in this case, Melamad) supplied substantial assistance. Courts have held
10 that even ordinary course transactions, can constitute substantial assistance under some
11 circumstances, such as where there is an extraordinary economic motivation to aid in the fraud.
12
13 *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983). There can be no doubt that Melamad
14 had a heightened economic motivation to aid in the Amiran's unlawful activities in that he felt
15 that the purchase of Spanish Trails would return him millions of dollars after development.
16 Melamad felt so strongly about his potential financial return that he further assisted Amiran by
17 paying him \$225,000 for Regency's shareholder interest in Land Holding. Even a method or
18 transaction that is atypical or lacks business justification, it may be possible to infer the
19 knowledge necessary for aiding and abetting liability. *Woodward v. Metro Bank of Dallas*,
20 522 F.2d 84, 97 (5th Cir. 1975)
21
22

23
24 In short, Melamad, as a principal of Land Holding, actively assisted Amiran throughout
25 the entire transaction involving Spanish Trails. Thus all of the elements of the State RICO
26 cause of action have been proven. Therefore, the Gedalias are entitled to a recovery of treble
27 damages, or \$675,000, plus prejudgment interest and attorney's fees incurred in prosecuting
28 this action.
29

30 2. UNJUST ENRICHMENT 31

1 Because all of the events involved in the following causes of action occurred in
2 Arizona, it
3
4 is Plaintiffs' belief that Arizona law applies. However, to be safe, both Arizona and Nevada
5 law, where applicable, are set forth in the following causes of action, including those alleged in
6 the Counterclaim.

7
8 To recover on a theory of unjust enrichment, one must allege and prove that another
9 acquired the money or property under circumstances which renders the wrongdoers retention of
10 same inequitable. *Johnson v. American National Insurance Co.* 613 P.2d 1275, 126 Ariz.
11 219(1980). A constructive trust is a remedial device created by courts of equity to compel one
12 who unfairly holds a property interest to convey that interest to another to whom it justly
13 belongs. [citations omitted] The gist of the conduct which will lead to the imposition of a
14 constructive trust is the wrongful holding of property which unjust enriches the defendant at the
15 expense of the plaintiff. *Johnson, supra* citing *Brown v. Walls*, 10 Ariz. App. 168, 457 P.2d
16 355 (1969) Simply stated, An individual is required to make restitution if he or she is unjustly
17 enriched at the expense of another.

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19
20
21 The evidence elicited at trial, conclusively establishes that Amiran used funds in the
22 amount of \$225,000, funds that were embezzled from the Gedalias, to purchase Regency's
23 interest in Land Holding and therefore Spanish Trail. Later, after the lawsuit was filed,
24 Melamad paid Amiran the \$225,000.00 and received an additional 25% interest in Land
25 Holding. As Melamad was aware that Plaintiffs had filed the lawsuit against Land Holding, it
26 would have been incumbent on him to inquire as to where Amiran's money came from.
27
28 Essentially, when he purchased the additional 25% interest in Land Holding from Regency, he
29 was well aware that he was purchasing an added interest in the lawsuit and stood the risk of
30
31

1 having to repay the Gedalias for the funds which Amiran stole. There can be little doubt that
 2 the Gedalias are entitled to a 25% interest in Land Holding and/or a constructive trust should be
 3 imposed on the property (Spanish Trails) for \$225,000.00 plus interest from the date of the
 4 embezzlement.
 5

6 **3. FRAUD**

7
 8 The evidence elicited at trial, and in particular, the fact that the lawsuit against all
 9 defendants except Land Holding was settled with Amiran admitting to wrongful taking of over
 10 \$9,000,000 from the Gedalias, demonstrates conclusively that Amiran committed fraud against
 11 the Gedalias.
 12

13 As set forth above in the State RICO claim, one can be liable for another's fraud, when
 14 he/she actively assists the wrongdoer in the unlawful activities. The circumstantial evidence
 15 relating to the assistance given to Amiran and his related companies by Melamad on behalf of
 16 Land Holding, renders Land Holding liable for Amiran's fraud. Thus the Gedalias should be
 17 awarded \$225,000 against Land Holding.
 18

19 **DEFENDANT'S COUNTERCLAIMS**

20
 21 The counterclaim filed by all of the Defendants contained the following causes of
 22 action: 1) Violation of Federal Rico; 2) Breach of Contract; 3) Breach of Covenant of Good
 23 Faith and Fair Dealing; 4) Breach of Fiduciary Duties; 5) Conspiracy; 6) Intentional
 24 Misrepresentation; 7) Negligent Misrepresentation; 8) Abuse of Process; 9) Intentional
 25 Interference with Contractual Relations; 10) Intentional Interference with Prospective
 26 Economic Advantage; 11) Unjust Enrichment; 12) Receivership; 13) Indemnity; 14)
 27 Contribution; 15) Conversion; 16) Misappropriation of Trade Secrets; and 17) Quiet Title.
 28
 29

30 As a preliminary matter, the entire counterclaim should be dismissed as to
 31

1 Counterdefendant, Arthur Dean (Marty) Martin. During trial, counsel for Land Holding
 2 admitted that Amiran and ITC Homes were the entities that sued Mr. Martin and that he should
 3 have been dismissed from the lawsuit but for some unknown reason the dismissal never
 4 happened. (RT: Sept. 17, 2009, pm session, Pg. 37, lns 1-12). Further, there was no evidence,
 5 direct or circumstantial, presented at trial that Martin did anything wrong.
 6

7
 8 Further, Land Holding's Counterclaim does not allege any wrongful acts committed
 9 against it by Counterdefendants, Suzie Gedalia and Isaac Gedalia. More importantly no
 10 evidence was elicited at trial that would support any wrongdoing regarding these
 11 counterdefendants on any causes of action the Court should enter judgment in their favor.
 12

13
 14 **First Cause of Action: Violation of Federal Rico:**

15 18 U.S.C. Section 1962 provides:

- 16 (a) It shall be unlawful for any person who has received any income derived,
 17 directly or indirectly, from a pattern of racketeering activity or through
 18 collection of an unlawful debt in which such person has participated as a
 19 principal within the meaning of section 2, Title 18, United States Code,
 20 to use or invest, directly or indirectly, any part of such income or the
 21 proceeds of such income, in acquisition of any interest in, or the
 22 establishment or operation of, any enterprise which is engaged in, or the
 23 activities of which affect, interstate or foreign commerce. A purchase of
 24 securities on the open market for purposes of investment, and without
 25 the intention of controlling or participating in the control of the issuer, or
 26 of assisting another to do so, shall not be unlawful under this subsection
 27 if the securities of the issuer held by the purchaser, the members of his
 28 immediate family, and his or their accomplices in any pattern or
 29 racketeering activity or the collection of an unlawful debt after such
 30 purchase do not amount in the aggregate to one percent of the
 31 outstanding securities of any one class, and do not confer, either in law
 or in fact, the power to elect one or more directors of the issuer.
- (b) It shall be unlawful for any person through a pattern of racketeering
 activity or through collection of an unlawful debt to acquire or maintain,
 directly or indirectly, any interest in or control of any enterprise which is
 engaged in, or the activities of which affect, interstate or foreign
 commerce.
- (c) It shall be unlawful for any person employed by or associated with any

1 enterprise engaged in, or the activities of which affect, interstate of
2 foreign commerce, to conduct or participate, directly or indirectly, in the
3 conduct of such enterprise's affairs through a pattern of racketeering
4 activity or collection of unlawful debt.

5 It shall be unlawful for any person to conspire to violate any of the
6 provisions of subsection (a), (b), or (c) of this section.

7 Land Holding maintained in its Trial Statement that as it relates to this cause of action,
8 "the joint venture between M&S Unlimited and ITC Homes fell under and stayed under the
9 Gedalia' control as a result of their deceiving the Counterclaimants. The racketeering
10 allegations consisted of a series of mail fraud and wire fraud which were all related to the
11 Project of the parties."

12 At trial, Land Holding failed to elicit any testimony that would support these
13 contentions. There was no evidence to support that Gedalias deceived anyone. Nor was there
14 any testimony to substantiate the alleged mail and wire fraud.
15

16 The Federal law, the RICO act, defines four violations: 18 U.S.C. 1962(a) proscribes
17 investment of racketeering proceeds into an enterprise; 18 U.S.C. 1962(b) proscribes use of
18 racketeering methods to gain control of an enterprise; 18 U.S.C. 1962(c) proscribes conspiracy
19 to violate the law. Proof of each of the federal violations of RICO necessarily includes proof of
20 an enterprise. A major issue in federal RICO case law has concerned the requirement in
21 litigation under 18 U.S.C. 1962(a), the majority rule is that the injury alleged must come from
22 the use or investment of racketeering income in an enterprise rather than from predicate acts
23 alone. Proof of an enterprise is a required element of each Federal RICO violations.
24

25 //

26 Proof of a violation of the federal RICO Act also requires, in addition to proof of an
27 enterprise, proof of a pattern of racketeering activity. The federal courts have long used the
28

1 relationship plus continuity test to define the pattern of racketeering activity. To recapitulate,
2 the federal pattern provisions requires at least 2 acts of racketeering activity within 10 years.
3 Thos acts must bear a relationship to each other and must also be continuous in nature, either
4 on a closed-ended or open-ended basis.
5

6 Therefore, to succeed on a RICO cause of action, Land Holding was required to prove
7 that, at a minimum, the Gedalias committed two acts of mail and wire fraud or other predicate
8 acts. Land Holding failed to provide any evidence that the Gedalias committed any acts of
9 racketeering activity, let alone two.
10

11 Additionally, the defendants must have utilized a separate enterprise in its racketeering
12 activities. Nor did Land Holding present any evidence at trial that the Gedalias were engaged
13 in a pattern of racketeering activity. Further, the plaintiff must prove that the enterprise not only
14 existed, but that the enterprise was engaged in or affected interstate or foreign commerce.
15 Absolutely no evidence was presented at trial that could be construed to support the required
16 elements to succeed on a Federal RICO cause of action.
17

18
19 **Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing.**
20

21 As no contract existed between Moshe, M&S and Land Holding, there cannot be no
22 breach of contract and/or the breach of the covenant of good faith and fair dealing.
23

24 **Breach of Fiduciary Duties.**

25 As admitted by Land Holding in its Trial Statement because the Gedalias were strangers
26 to Land Holding no fiduciary relationship could exist.
27

28 **Conspiracy**

29 An actionable civil conspiracy is a combination of two or more persons who, by some
30 concerted action, intend to accomplish some unlawful objective for the purpose of harming
31

1 another which results in damage. **Collins v. Union Fed. Savings & Loan**, 99 Nev. 284,303,
2 662 P.2d 610(1983).

3
4 The Arizona Supreme Court held in *Wells Fargo Bank, supra*, “For a civil conspiracy
5 to occur two or more people must agree to accomplish an unlawful purpose or to accomplish a
6 lawful object by unlawful means causing damages.” [citing *Baker v. Stewart Title & Trust of*
7 *Phoenix*, 197 Ariz. 535, 542, 5 P.3d 249, 256]. More importantly, a claim for civil conspiracy
8 must include an actual agreement, proven by clear and convincing evidence. (emphasis
9 added) *Wells Fargo Bank, supra*

10
11 Land Holding failed to present any evidence that any of the counterdefendants intended
12 to accomplish some unlawful objective for the purpose of harming another. The facts of this
13 case showed that the fraud committed by Ron Amiran, through his related companies was so
14 complex and surreptitious that the filing of the lawsuit and the naming of related companies,
15 including Land Holding, as defendants, was the only method available for the Gedalias to
16 recover millions of dollars due their company. At the time the lawsuit was filed, Regency
17 Consulting, an Amiran related company, owned 25% of Land Holding shares. Evidence also
18 showed that Amiran had taken hundreds of thousand dollars in unauthorized consulting fees,
19 approximately \$200,000 of which he used, through Regency Consulting, to purchase the vacant
20 land known as Spanish Trials. Therefore, there was no combination of two or more persons
21 who intended to accomplish some unlawful objective for the purpose of harming another.

22
23 In fact, the evidence shows that the Gedalias “bent over backwards” to assist the other
24 principals of Land Holding, when they became known to them. On or about February 13, 2006,
25 shortly after the lawsuit was filed Isaac Gedlia testified that a lis pendens was placed on the
26 Spanish Trail property. After the principals of Land Holding, Melamed, Bachar and
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1 Manshoory, contacted Isaac and informed him that Amiran had convinced them to invest in
2 Land Holding, and they stood to lose their investment. The Gedalias were willing to lose the
3 \$225,000.00 Amiran had stolen from them to purchase the Land Holding shares through
4 Regency. Gedalias would release the lis pendens and dismiss Land Holding from the lawsuit.
5 Incredibly, Land Holding refused to accept this offer made within a few months after the
6 lawsuit was filed. (RT: Sept. 30, 2009 a.m. session, Pg. 141, ln 16 through 143 ln 20)
7
8

9 Despite the refusal of Land Holding to dismiss its counterclaims against the Gedalias,
10 the Gedlias released the lis pendens on the property, leaving Land Holding free to develop the
11 property. (RT: Sept. 30, 2009 a.m. session, Pg. 143, ln 17 through Pg. 144, ln 5)
12

13 Land Holding's refusal to agree to a dismissal of it as a defendant in this action so soon
14 after the lawsuit was filed can only be construed that it, or its principals felt that they could sit
15 back, do nothing for 5 or 6 years and then sue the Gedalias for Land Holding's loss of potential
16 profits. This inference is bolstered by the fact that immediately after the bank denied the Land
17 Holding construction loan, Amiran requested that Chip Shaw provide him with a writing setting
18 forth the reasons for the denial of the loan. Although the email, identified as Exhibit "6" to the
19 deposition of Mr. Shaw and Book 2, Tab 62 of the trial exhibits, actually favors Plaintiffs, such
20 email appears to be altered. The December 29, 2005, email does not contain an email name
21 and/or address to who the email was purportedly sent. All emails must contain a "Sent To" as
22 without this information the email cannot be sent to the proper recipient. Comparisons with tab
23 section 42 and tab 150 of the trial exhibits are standard emails sent from Chip Shaw and all
24 bear the Sent To information. The inference from the actions and/or in actions of Land
25 Holding cannot be anything but it wanted to maintain causes of action against the Gedalias
26 right from the start in the hopes that the investors can line their pockets with millions of dollars
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1 without the time, money and effort required to develop the vacant land.

2 **Intentional Misrepresentation**

3
4 A civil claim for fraud is established by showing that the tortfeasor made a false and
5 material representation with knowledge of its falsity or ignorance of its truth, with intent that
6 the hearer would act upon the representation in a reasonably contemplated manner and that the
7 hearer, ignorant of the falsity of the representation, rightfully relied upon the representation and
8 was thereby damaged. *Dawson v. Withycombe*, 163 P.3d 1034, 215 Ariz. 84 (2207).

9
10 Land Holding alleged that the Gedalias had a meeting with Chip Shaw a vice president
11 of the Bank which had supplied it with a Letter of Interest, and made false statements regarding
12 Land Holding, Amiran and Land Holding's principal. However, Land Holding failed to present
13 any evidence at trial which would support this cause of action or these allegations. No
14 representations were made to the Land Holding principals as they never had any meetings with
15 the Gedalias prior to the lawsuit being filed.

16
17 Chip Shaw testified that the only reason the bank had withdrawn its interest in lending
18 the money needed to develop Spanish Trails was the lawsuit and solely the lawsuit. Mr. Shaw
19 testified in his deposition as follows:

20
21
22 Q. Is it fair to say that based upon your knowledge, the existence of the Gedalia
23 lawsuit was the sole factor in the bank not proceeding with the loan to Land
24 Holding Group, Inc.?

25 A. Yes.

26 Q. And you aren't aware of any other reason why that loan would have been
27 declined other than the Gedalia lawsuit, correct?

28 A. Yes. (**Shaw Depo, Pg. 13, lns 4-12**)

29 Q. First of all, your statement that the loan was declined was truthful; it was declined
30 because of the lawsuit, that was a truthful statement when you wrote it, correct?

31 A. Yes (**Shaw Depo, Pg. 15, lns 21-24**)

Q. Okay. And you indicated in an e-mail that based sole reason (sic) for the loan
being denied was the lawsuit, correct?

A. Yes. (**Shaw Depo, Pg. 31, lns 18-22**)

1 The evidence elicited at trial failed to show that the Gedalias made any false statements
 2 to the Bank. Even if there were false statements made, such statements were not material in
 3 that the sole reason the loan was denied was because Land Holding and Amiran were involved
 4 in a lawsuit with the Gedalias. In fact, there was no credible evidence presented at trial that the
 5 Gedalias made any misrepresentations to the Bank or the principals of Land Holding.
 6 Therefore, judgment must be in favor the Gedalias on this cause of action.
 7
 8

9 **Negligent Misrepresentation**

10 The same arguments made regarding the Intentional Misrepresentations set forth above
 11 are applicable to this cause of action. The evidence is conclusive that the letter of loan interest
 12 was withdrawn by the Bank based solely on the lawsuit, therefore, any representations made by
 13 the Gedalias are not relevant.
 14

15 **Abuse of Process.**

16 The elements of a claim for Abuse of Process are:

17 (1) an ulterior purpose by the defendants other than resolving a legal dispute; and 2) a
 18 willful act in the use of the legal process not proper in the regular conduct of the proceeding.
 19
 20 *Kovacs v. Acosta*, 106 Nev. 57, 787 P.2d 368 citing *Bull v. McCluskey*, 96 Nev. 706, 615 P.2d
 21 957 (1980); *Nevada Credit Rating Bureau v. Williams*, 88 Nev. 601, 503 P.2d 9 (1972)
 22
 23

24 In the instant action, Land Holding's claims fails as a matter of law because it does not
 25 satisfy either of the requirements of a cognizable claim for Abuse of Process.

26 Land Holding merely alleges that "Counterdefendants abused the judicial process by
 27 commencing this lawsuit against Defendants and asserting the frivolous claims contained
 28 therein, and did so for an ulterior purpose other than resolving a legal dispute, and to otherwise
 29 cause Counterclaimants economic harm and damage. (Counterclaim paragraph 201).
 30
 31

1 Land Holding's reasoning and senseless arguments are without any foundation or
 2 support in fact or law. Land Holding did not elicit any evidence to support a cognizable
 3 "ulterior purpose". Clearly there is no "abuse of process" as a matter of law; and as such, Land
 4 Holding's meritless claim for Abuse of Process must be adjudicated in favor of M&S and
 5 Moshe.

6
 7 The second element of an Abuse of Process claim is that the defendant must have
 8 engaged in "a willful act in the use of the legal process not proper in the regular conduct of the
 9 proceeding." Land Holding failed to produce any evidence that the filing of the instant lawsuit
 10 was improper. In fact, the evidence was overwhelming in the Gedalias favor that the filing of
 11 the lawsuit was warranted. The Gedalias "use" of the legal process was "proper" per se as a
 12 portion of the money was embezzled from them was used to purchase Spanish Trails. **(Linscott**
 13 **Depo: Pg. 27, lns 8 through 14)(Linscott Report, Exhibit "44")**

14
 15 There is no abuse of process if it is used for its proper purpose even though the person
 16 uses it for wrongful and malicious motives. *Pimentel v. Houk*

17
 18
 19 **Intentional Interference with Contractual Relations.**

20
 21 To state a claim for tortuous interference with contractual relations in Nevada, a
 22 plaintiff must establish the following elements: 1) a valid and existing contract; 2) the
 23 defendant's knowledge of the contract; 3) intentional acts intended or designed to disrupt the
 24 contractual relationship; 4) actual disruption of the contract; and 5) resulting damage. *Paul*
 25 *Steelman Limited v. HKS, Inc.* No. 2:05-cv-01330 (D. Nev. 2007)

26
 27 Arizona law requires the same elements. Short shrift can be made of this cause of
 28 action because there was not a valid and existing contract between Land Holding and the Bank.
 29 Chip Shaw testified as follows:
 30
 31

1 Q. And once that package was complete at some point in time, what's
2 the third state of it?

3 A. Then a credit request would be written up and submitted to the committee
4 for approval.

5 Q. And who writes the credit request up?

6 A. I would have.

7

8 Q. Was the credit request done –

9 A. No.

10 Q. – before you first found out about the lawsuit?

11 A. No.

12 Q. No? Okay.

13 And then after the credit request, what would have been the next
14 step in the process?

15 A. It would have gone to closing.

16 Q. And that's where the loan is approved, the –

17 A. That would be where the legal documents are done, all the documents are executed.

18 Q. Did this loan reach that stage?

19 A. No. (**Shaw Depo, Pg. 28, ln 13 through Pg. 29, ln 18**)

20 The evidence shows that the loan was not approved at the time the lawsuit was
21 filed. Therefore, there was no valid contract existing at the time the Bank denied the loan and
22 this cause of action must fail.

23 Further more, Land Holding did not present any evidence that the Gedalias lacked
24 sufficient justification or privilege to file the lawsuit. A settlement in excess of \$9,000,000.00
25 shows that the lawsuit was meritorious in all respects.

26 **Intentional Interference with Prospective Economic Advantage.**

27 The elements of the tort of wrongful interference with prospective economic advantage,
28 are as follows: 1) a prospective contractual relationship between the plaintiff and a third part; 2)
29 the defendant's knowledge of this prospective relationship; 3) the intent to harm the plaintiff by
30 preventing the relationship; 4) the absence of privilege or justification by the defendant; and 5)
31 actual harm to the plaintiff as a result of the defendant's conduct. *LTR Stage Lines v. Gray
Line Tours*, 106 Nev. 283, 792 P.2d 386 (Nev. 1990)

1 Land Holding did not present any proof that the Gedalias were aware of the potential
2 contractual relationship between Land Holding at the time the lawsuit was filed. What was
3 proven however, is that Land Holding was a proper defendant in that it used money embezzled
4 from the Gedalias to assist in purchasing Spanish Trails. Therefore, the filing of the lawsuit
5 was justified, as demonstrated by the fact Amiran stipulated to a judgment in excess of
6 \$9,000,000.00.
7

8
9 //

10 Further, Land Holding did not present any proof that the Gedalias intended to harm it.
11 In fact, the evidence is the opposite: as set more fully above. Shortly after the lawsuit was filed
12 the Gedalias discovered that Amiran had induced others to invest in Land Holding. The
13 Gedlias offered to dismiss the action against Land Holding and lose the \$200,000.00 plus that
14 Amiran embezzled from them and used to purchase the Regency shares in Land Holding. (See
15 **testimony of Isaac Gedalia cited hereinabove**)
16

17 Attempts to obtain property wrongfully taken from one, certainly justifies the filing of
18 a lawsuit.
19

20
21 **Unjust Enrichment.**

22 The elements of Unjust Enrichment are set forth above in Plaintiffs' case in chief.

23 An individual is required to make restitution if he or she is unjustly enriched at the
24 expense of another. Land Holding did not present any evidence that the counterdefendants
25 were enriched or received any benefits that would require restitution to Land Holding. In fact,
26 the evidence conclusively demonstrated that Amiran stole millions of dollars from the Gedalias
27 and a portion of the money was spent to purchase a 25% interest in Land Holding. After the
28 lawsuit was filed, Amiran sold the interest in Land Holding which Regency held to Melamed
29
30
31

1 for \$240,000.00. The lawsuit should have put the investors solicited by Amiran on notice that
 2 the funds used by Amiran were actually due to the Gedalias. Therefore, it was Land Holding
 3 that unjustly benefited.
 4

5 **Receivership, Indemnity and Contribution**

6 Land Holding admitted in its Trial Statement that these causes of action were only
 7
 8 between the Gedalias and ITC Homes, and therefore are not alleged by Land Holding.

9 **Conversion.**

10 Conversion is an intentional exercise of dominion or control over a chattel which so
 11 seriously interferes with the right of another to control it that the actor may justly be required to
 12 pay the other the full value of the chattel. (emphasis added) *Strawberry Water Co. v. Paulsen*,
 13 207 P.3d 654, 220 Ariz. 401 (2008). In Nevada, conversion is a distinct act of dominion
 14 wrongfully exerted over another's personal property in denial of, or inconsistent with his title
 15 or rights therein or in derogation, exclusion, or defiance of such title or rights. (emphasis
 16 added) *Evans v. Dean Witter Reynolds, Inc.* 116 Nev. 598, 5 P.3d 1043 (2000)
 17
 18

19 No proof was offered at trial that the Gedalias converted any property, real or personal,
 20 which was owned by Land Holding. A cause of action will not lie for conversion of real
 21 property.
 22
 23

24 **Misappropriation of Trade Secrets.**

25 This cause of action is not related to the issues between the Gedalias and Land Holding.

26 **Quiet Title**

27 The subject property is in the name of Land Holding and therefore title is not at issue.
 28 The issue is as follows: are the Gedalias entitled to the 25% interest in Land Holding that was
 29 purchased by Regency with money stolen from them. Because Melamad was aware of the
 30
 31

lawsuit and the allegations that Amiran had stolen money from the Gedalias in order to purchase Spanish Trails when he purchased the shares from Regency, he cannot be considered a bona fide purchaser. Therefore, the Gedalias and/or M&S should be declared to be owners of 25% of the shares of Land Holding.

CONCLUSION

For the reasons set forth above, judgment should be awarded Plaintiffs against Land Holding on its complaint. Further, judgment should be against Land Holding and in favor of Plaintiffs on all of the relevant causes of action set forth in the Counterclaim.

DATED: December 9, 2009

Respectfully submitted,

/s/ Thomas Michaelides

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CERTIFICATE OF SERVICE

1. On December 9th 2009, I served the following document(s):

POST TRIAL / PRE-ORAL ARGUMENT BRIEF

I served the above-named document(s) by the following means to the persons as listed below:

- a. ECF System (attached the "Notice of Electronic Filing" or list all persons and addresses):
 - U.S. TRUSTEE – LV – 11 USTPRegion17.lv.ecf@usdoj.gov
 - United States mail, postage fully prepaid (list persons and addresses):
 - Personal Service (list persons and addresses): I personally delivered the document(s) to the persons at these addresses:
 - By direct email (as opposed to through the ECF System) (list persons and email addresses):

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Adams & Rocheleau, LLC
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- By fax transmission (list persons and fax numbers):
- By messenger:

I declare under penalty of perjury that the foregoing is true and correct.

DATED: December 9, 2009

Respectfully submitted,

/s/ Thomas Michaelides

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